IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1738

WILLIAM M. SEWELL,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

ON APPEAL
FROM THE
GEORGIA SUPREME COURT

JURISDICTIONAL STATEMENT

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v.

STATE OF GEORGIA,
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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Georgia Supreme Court entered February 23, 1977 affirming a judgment of conviction entered against Appellant in the Criminal Court of Fulton County, Georgia. Appellant submits this Jurisdictional Statement to show that the

Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the Georgia Supreme Court is reported at Ga. , 233 S.E.2d 187 (1977). A copy thereof is set forth in Appendix A hereto.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on February 23, 1977. An application for rehearing was timely filed and it was denied on March 9, 1977. A copy of said denial is set forth in Appendix B hereto. A Notice of Appeal was filed in the Georgia Supreme Court on March 21, 1977. A copy of said Notice is set forth in Appendix C hereto. Appellant challenges the validity of the state statute under which he was convicted, Georgia Criminal Code §26-2101 (c), on the ground of its being repugnant to the Fourteenth Amendment to the Constitution of the United States and the decision of the Georgia Supreme Court is in favor of its validity. Additionally, Appellant charges the validity of the state statute under which the jury was instructed on *scienter*, Georgia Criminal Code §26-2101 (a), on the ground of its being repugnant to the First and Fourteenth Amendments to the Constitution of the United States and the decision of the Georgia Supreme Court is in favor of its validity. The jurisdiction of the Supreme Court to review the judgment is thus conferred by Title 28, United States Code, Section 1257 (2). The decision of this Court in *Frank v. Maryland*, 359 U.S. 360 (1959) sustains the jurisdiction of this Court

to review the judgment of the Georgia Supreme Court by way of appeal in this case.

QUESTIONS PRESENTED

1. Whether there is any rational basis upon which a state may totally prohibit and impose criminal penalties for the dissemination of devices designed or marketed as useful primarily for the stimulation of human genital organs.

2. Whether a state statute which defines *scienter* in a manner which authorizes obscenity convictions on mere "constructive" knowledge impermissibly chills the dissemination of materials protected under the First and Fourteenth Amendments to the United States Constitution.

3. Whether a warrantless mass seizure of allegedly obscene material may be sustained under the plain view doctrine.

4. Whether the press materials charged against Appellant are not obscene as a matter of law, constituting expression protected under the First and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of Georgia Criminal Code §26-2101 is set forth in Appendix D hereto. Also set forth in Appendix D are those provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution which Appellant claims to be dispositive of the validity of said statute as well as the other question presented herein.

STATEMENT

On July 3, 1975, three Atlanta area law enforcement officers proceeded to the Stewart Avenue Adult Book Store where one of the officers entered the store and purchased a book entitled "Hot and Sultry" and an artificial vagina from the Appellant. After the purchase, the others entered the store, identified themselves as law enforcement officers, and placed Appellant under arrest for distributing obscene material.

Immediately following the arrest of Appellant, the officers seized all of the alleged sexual devices that were in view in the store. One of the officers testified that this warrantless mass seizure was conducted pursuant to instructions he had received from his superiors to seize "anything pertaining to sexual stimulation." (Tr. 20, 21)

Appellant was charged in a single count accusation with distributing obscene material in violation of Georgia Criminal Code §26-2101. The charge was predicated upon his sale of the magazine and "artificial vagina," as well as his possession of the other alleged sexual devices. The magazine was alleged to be obscene under sub-section (b) of the statute, a portion which Appellant does not challenge. That sub-section defines obscenity in terms substantially similar to those enunciated by this Court as a constitutional standard in *Miller v. California*, 413 U.S. 15 (1973). The magazine was thus judged by the three part *Miller* test defining obscene material as that material which appeals to a prurient interest in sex, describes specifically defined sexual conduct in a patently offensive way, and lacks serious literary, artistic, political or scientific value. *Id.* Again, this portion of the statute is not challenged by Appellant.

The alleged sexual devices were alleged to be obscene under sub-section (c) of the Georgia Obscenity Code which provides as follows:

> "Any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section."

Under this sub-section, which Appellant does challenge, items may be obscene (and thus illegal) even though they do not meet the obscenity test set forth in *Miller, supra.* Under this sub-section, any device intended for the stimulation of human genitals is obscene and the sale of such items is thus illegal.

Appellant was tried on the single count accusation before a court and jury in the Criminal Court of Fulton County, Georgia. The jury found Appellant guilty and the Court sentenced him to a term of imprisonment for one year and a $4,000.00 fine. A Motion For New Trial was thereafter filed and overruled and Appellant appealed the conviction to the Supreme Court of Georgia. That Court affirmed the conviction and sentence in all respects in a judgment and opinion for which review is sought here.

HOW THE FEDERAL QUESTIONS WERE RAISED

Prior to the trial herein, Appellant filed a Motion to Dismiss the Accusation insofar as it related to offenses under Georgia Criminal Code §26-2101 (c). The Motion to Dismiss was predicated upon the argument that the section in question (relating to sexual devices) was violative of the United States Constitution on grounds of vagueness, overbreadth, and invasions of the rights of due process and privacy "by making criminal material which is in no way

harmful to the public." Consolidated Motion to Dismiss, at 2. Appellant also filed, prior to trial, a motion to suppress those items that had been taken by law enforcement officers in the warrantless mass seizure of alleged sexual devices. The seizure was alleged to be in violation of Appellants rights under the Fourth and Fourteenth Amendments to the United States Constitution. Consolidated Motion to Suppress.

The Motion to Suppress and the Motion to Dismiss were heard before the Criminal Court of Fulton County on January 19, 1976. The federal grounds here asserted were asserted by counsel for Appellant in oral argument on said motions. Those motions were overruled and denied on January 19, 1976.

Appellant then went on trial before a court and jury on January 22,1976. During the course of the trial Appellant objected to the introduction of the alleged sexual devices for all of the grounds, including the federal constitutional grounds, previously asserted in the Consolidated Motion to Dismiss and in the Consolidated Motion to Suppress. The objections were overruled with the Court's understanding that "all of the previous grounds that are contained in the motion [the court understands] are preserved." (Tr. 33)

At the conclusion of the trial, the jury was instructed and said instructions contained the definition of *scienter* which Appellant challenges here. The instructions followed the language of Georgia Criminal Code §26-2101 (a) in telling the jury that the *scienter* requirement does not necessitate actual knowledge of the contents but may be

satisfied by a showing of "constructive" knowledge thereof. Appellant objected to this instruction as failing to meet the Constitutional minimum standards for *scienter* set forth by this Court in *Hamling v. United States,* 418 U.S. 87 (1974).

Following his conviction, Appellant filed an Amended Motion For New Trial which presented once again to the trial court the federal questions presented herein. Said Amended Motion For New Trial, filed August 30, 1976 asserted that the sexual device statute, Georgia Criminal Code §26-2101 (c) was violative of the First, Fifth and Fourteenth Amendments to the United States Constitution. Said motion further challenged the warrantless mass seizure of such devices as violative of the First, Fourth and Fourteenth Amendments to the United States Constitution. It further contended that the materials charged against Appellant were not obscene as a matter of law and thus constituted protected expression under the First and Fourteenth Amendments to the United States Constitution. Finally, said motion argued that the jury instructions on constructive knowledge failed to meet the Constitutional minimum standards of *scienter* set forth by this Court. The Amended Motion For New Trial was overruled by the Criminal Court of Fulton County without opinion on September 3, 1976.

Appellant thereafter appealed to the Supreme Court of Georgia, raising therein all of the federal questions presented here. That Court addressed all of the Federal questions on the merits and rejected each of them in the judgment and opinion for which review is here sought. The Court affirmed Appellants conviction and he is presently incarcerated serving the one year term of imprisonment to which he was sentenced in this case.

THE QUESTIONS ARE SUBSTANTIAL

I.

THERE IS NO RATIONAL BASIS UPON WHICH A STATE MAY TOTALLY PROHIBIT AND IMPOSE CRIMINAL PENALTIES WHERE THE DISSEMINATION OF ANY DEVICE DESIGNED OR MARKETED AS USEFUL PRIMARILY FOR THE STIMULATION OF HUMAN GENITALS.

The state does not contend that the bulk of the material charged against Appellant, the alleged sexual devices, are obscene under Georgia Criminal Code §26-2101 (b) which sets forth the standard three part *Miller* obscenity test. Rather, they are alleged to violate Georgia Criminal Code §26-2101 (c) which provides:

> "Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section."

The seriousness of this question is first demonstrated by the fact that the above definition contains none of the Constitutional limitations upon obscenity set forth by this court in *Miller v. California, supra.* Material may be found obscene under this statute even though it does not meet any of the three tests for obscenity set forth by this Court as Constitutionally necessary in the *Miller* decision. The seriousness of the question here presented is further demonstrated by the fact that the total prohibition of such devices bears no reasonable relationship to any conceivable public interest and has no rational basis.

In *Miller,* the Supreme Court noted that "state statutes designed to regulate obscene material must be carefully limited." 413 U.S. 15, at 23-24. As a result of the need for careful limitation, Supreme Court confined the permissible scope of any state obscenity statute to the regulation of materials which "depict or describe sexual conduct." 413 U.S. 15, at 24. It is clear that, whatever their intended use, the items do not depict sexual conduct.

Further, the Court in *Miller* went on to hold that any state obscenity offense must be limited to those materials which meet a three part test:

> "A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." 413 U.S. 15, at 24.

The statute in question here sets forth an obscenity offense which is not limited to the category which the Supreme Court found acceptable in *Miller.* It is thus clearly unconstitutional for authorizing the suppression of material as "obscene" even though such material may not appeal to a prurient interest in sex, may not portray sexual conduct in any way, and may possess serious literary, artistic, political or scientific value.

Further, the statute is unconstitutionally vague in its definition of prohibited devices. A novelty item may be marketed or intended as an inducement to humor, but the vendors of such items can only guess as to what is meant by the phrase "intended or marketed primarily for the

stimulation of human genital organs." The State's only witness in the trial below testified that he could only "guess" as to the intended use of materials he seized. It is clear that in the First Amendment area "government may regulate . . . only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). In so regulating, the State must avoid the use of language which is so vague that "men of common intelligence must necessarily guess as to its meaning." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926).

Appellant does not contend that no reasonably jury could not find the items obscene if they were judged under the *Miller* obscenity standards. Appellant concedes that similar devices have been held obscene under the three part *Miller* test in other cases. Appellant objects that the devices in this case were judged not by that constitutionally acceptable three part standard but rather by a standard of obscenity which this court has never approved.

In addition to falling outside any constitutionally approved standard of obscenity, the statute carries the state into areas where it has no conceivable public interest. In this regard it is important to note that the statute is not limited to the commercial utilization of sexual devices, rather, it prohibits any sale of any such device to any person. Individuals are thus prohibited from purchasing such items even for their own personal private use on their own bodies in the privacy of their own homes. The state has no possible interest in prohibiting an adult from masturbating in the privacy of his or her home. Likewise, there can be no rational basis for prohibiting the sale of items which such individuals might utilize in so masturbating.

This court has often invalidated legislation because it lacked a reasonable relationship to any public interest. In *Pierce v. Society of Sisters*, 268 U.S. 518 (1925), the court held an Oregon mandatory public school attendance statute invalid, noting:

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state." 268 U.S., at 636.

In *Meyer v. Nebraska*, 262 U.S. 390 (1923) the court overturned a state statute prohibiting the study of the German language, stating:

> "The problem for our determination is whether the statute as construed and applied unreasonably infringes a liberty, guaranteed . . . by the Fourteenth Amendment . . . the established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." 262 U.S., at 399-400.

Even assuming, arguendo, that the state has some interest in regulating certain uses to which sexual devices might be put, the statute here in question is overbroad in its total prohibition of such devices. In *Shelton v. Tucker*, 364 U.S. 479 (1960) this court stated in this regard:

> "In a series of decisions, this court has held that, even though the government purpose be legitimate and substantial, that purpose cannot be pursued

> by means that broadly stifle fundamental personal liberties when the end can be more narrowly reserved." 364 U.S., at 488.

In his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965), Mr. Justice Goldberg reiterated the importance of using the least restrictive alternative when government regulation is in question:

> "In a long series of cases this court has held that where fundamental personal liberties are involved, they may not be abridged by the state simply on a showing that a regulatory scheme has some rational relationship to the effectuation of a proper state purpose. 'Where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling.' *Bates v. Little Rock*, 361 U.S. 516, 524. The law must be shown 'necessary and not merely rationally related to the accomplishment of a permissible state policy.' *McLaughlin v. Florida*, 379 U.S. 184, 196." 381 U.S., at 497.

This case is similar to that presented in *Griswold, supra*, where this court struck down a statute making any use of contraceptives a criminal offense. In finding that law unconstitutional, the court noted that it impinged upon a protected right to marital privacy. The prohibition in this case impinges upon the same fundamental right. The statute is not limited to the prohibition of the sale of such devices to minors nor to the prohibition of the commercial use of such devices. It merely sweeps all devices within the definition of obscenity and therefore criminalizes their distribution to anyone, including married couples.

Although this court may not specify how a legislature is to meet legitimate social ends, it may prohibit the utilization of means that are unduly restrictive of individual freedom. *Dean Milk v. Madison*, 340 U.S. 349 (1951).

All of the above argument proceeds on the premise that the state has some legitimate interest in regulating the uses to which sexual devices might be put. Appellant does not concede that the state has any such interest. But, even if it does, no possible rational basis can be imagined for total prohibition of such devices. No conceivable public interest can be served by prohibiting an individual from purchasing an item to further his own masturbation or to utilize in sexual activities with his spouse.

In answer to this argument, the Supreme Court of Georgia merely noted that the Georgia obscenity statute had previously withstood constitutional attacks based upon grounds of vagueness and overbreadth. The court held that subsequent amendments made no substantive change and the court thus relied upon its prior decision in *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (1974). For this court's convenience, a copy of the decision in *Dyke, supra* is set forth in Appendix E hereto. As the Court will note, the *Dyke* decision does not address any of the issues presented here. That case merely involved a film alleged to be obscene under the common three part obscenity standard which Appellant does not challenge. It did not involve any alleged sexual devices and that portion of the statute prohibiting sexual devices, Georgia Criminal Code §26-2101 (c), had not even been passed as part of the law when *Dyke* was decided. The decision in *Dyke* thus offers no support for the court's decision below since the law Appellant challenges

was not even passed at the time *Dyke* was decided. The Supreme Court of Georgia was apprised of this fact in Appellants Petition for Rehearing but rehearing was denied by that court without opinion.

II.

A STANDARD OF SCIENTER WHICH AUTHORIZES OBSCENITY CONVICTIONS ON MERE "CONSTRUCTIVE" KNOWLEDGE IMPERMISSIBLY CHILLS THE DISSEMINATION OF EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In its charge to the jury, the trial court gave the following instruction on the issue of *scienter:*

> "[T]he word 'knowing' as used herein shall be deemed to be the actual knowledge or constructive knowledge of the obscene contents of the subject matter. A person has constructive knowledge of the obscene contents if he has the knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material." (Tr. C-1,2.)

This instruction is in accord with the terms of Georgia Criminal Code §26-2101 (a) which Appellant challenges. The seriousness of this question is well demonstrated by the fact that certiorari has been granted on this precise issue in *Ballew v. Georgia,* No. 76-761, question number 2, certiorari granted January 25, 1977.

The most recent pronouncement of this Court on the requirements of *scienter* is found in *Hamling v. United States,* 418 U.S. 87 (1974). There, this Court stated:

> "We think the 'knowingly' language of 18 U.S.C. §1461 and the instructions given by the district court in this case satisfy the constitutional requirements of *scienter.* It is constitutionally sufficient that the prosecution show that the defendant *had* knowledge of the contents of material he distributes, and that he knew the character and nature of the materials." 418 U.S., at 123 (emphasis added).

Consistent with the above statement from *Hamling,* Appellant contends that the prosecution must show that he "had" knowledge rather than that he "should have had" knowledge of the content, character and nature of the materials with which he was charged. The arguments in support of this position are amply set forth in the Brief of Petitioner in the *Ballew* case and Appellant in this case relies thereon. It is here submitted that the granting of certiorari on this issue in *Ballew* amply demonstrates the substantiality of the question.

III.

APPELLANT'S CONSTITUTIONAL RIGHTS AGAINST UNREASONABLE SEARCHES AND SEIZURES WERE VIOLATED BY THE INTRODUCTION INTO EVIDENCE OF ALLEGEDLY OBSCENE ITEMS SEIZED BY LAW ENFORCEMENT OFFICERS WITHOUT A WARRANT.

The substance of the testimony at trial was that Officer Alexander of the Atlanta Police Department purchased one magazine and one novelty item from Appellant, that the officers thereafter arrested Appellant and confiscated all the novelty items present. No warrant was obtained nor was any attempt made to secure one. As Deputy Spence testified, the officers were instructed to seize everything in view which "pertained" to sexual stimulation.

Deputy Spence had no actual knowledge as to whether the devices he seized were designed or marketed primarily for stimulation of human genital organs. He stated that no one in the store told him what the items were intended for, that he had never used any of the items, that none of the other officers ever told him that they had used any of the items, and that he had never seen any of them used for sexual stimulation. He testified that he would "have to guess" what the items were used for since he had no actual knowledge. He further testified that even his guess work was insufficient at times since he did not know the possible uses of certain items.

Despite the uncertainty which led him to guess as to the possible uses of the items seized, Deputy Spence did

not submit the question to a neutral magistrate for a determination of whether the items were obscene under Ga. Code §26-2101 (c). There was no indication that the warrant could not be obtained or that it would be impractical to seek one. Deputy Spence testified that the devices were exhibited on shelves within the store and there is no indication that they would have been removed during the time it would take him to view the materials, describe his viewing to a neutral magistrate, and obtain a warrant. Indeed, Deputy Spence testified that the Defendant was the only individual in the store at the time of his arrest, and there was thus no one present to remove the goods had they been left in the store following his arrest. It is thus clear that the officers had ample opportunity to secure a warrant for the seizure of the items both before and after the arrest of the Defendant.

The principles applicable to the warrantless seizure of allegedly obscene material were set forth by United States Supreme Court in *Roaden v. Kentucky*, 413 U.S. 496 (1973). The Court there held that the warrantless seizure of an allegedly obscene film was unconstitutional under the First, Fourth and Fourteenth Amendments. The Court noted that the determination of obscenity must be made by a neutral and detached magistrate rather than a zealous law enforcement officer vigorously pursuing his role in adversary process of controlling crime. The Court thus noted:

> "The seizure proceeded solely on the police officer's conclusions that the film was obscene; there was no warrant. Nothing prior to seizure afforded a magistrate an opportunity to 'focus searchingly on the question of obscenity.'" 413 U.S. 496, at 506.

The Court thought the issue was controlled by its prior decision in *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968). Lee Art Theatre held that the warrant for the seizure of allegedly obscene material may not be issued on the mere conclusory allegations of a police officer. In light of that holding, it is even more clear that an officer may not be allowed to make a seizure of such material with no warrant at all.

> "If, as Marcus and Lee Art Theatre held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, *a fortiori*, the officer may not make such a seizure with no warrant at all." 413 U.S. 496, at 506.

The same conclusion must be reached in this case, and the warrantless mass seizure of all the novelty items as "obscene" must be held unconstitutional. The Georgia Supreme Court held that the mass seizure was justified under the "plain view" doctrine in that the items were in plain view. The issue is not whether they were in view, however, but whether a police officer or a magistrate should make the determination of obscenity before any item is seized as obscene. The items in *Roaden, supra*, and in *Lee Art Theatre, supra*, were also in plain view, but this did not serve to sustain their warrantless seizure.

On the basis of the *Lee Art* and *Roaden* decisions alone, Appellant submits that the decision below is so clearly erroneous as to justify summary reversal. At the very least, however, plenary review is called for before such a decision may be affirmed.

IV.

THE MATERIALS CHARGED AGAINST APPELLANT ARE NOT OBSCENE AS A MATTER OF LAW AND SAID MATERIALS CONSTITUTE PROTECTED EXPRESSION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court is respectfully requested to independently review the alleged obscenity of the book "Hot and Sultry." The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). It was later expounded upon in *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed here recently in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." The Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

This Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity *vel non* of the book "Hot and Sultry." As Deputy Spence testified below, the book "Hot and Sultry" contains no sexual acts, and depicts only nudity. An item

of similar explicitness was before this Court in *Jenkins v. Georgia, supra.* In reversing an obscenity conviction based upon the film "Carnal Knowledge" the Court there noted that the film did contain scenes of nudity. The Court nonetheless reversed the conviction, noting:

> "There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards." 418 U.S. 153, at 161.

The material presently before this Court is similar to that involved in the *Jenkins* decision. Whether or not the Court might find this material to be "soft core" pornography, it is clearly not "hard core" pornography. The Court in *Jenkins* noted that material must be "hard core" in order to support a constitutional conviction. The Court quoted from *Miller* to the effect that:

> "No one [may be constitutionally prosecuted] for the sale or exposure of obscene materials unless these materials depict or describe patently offensive *'hard core'* sexual conduct." 418 U.S. 153, at 160 quoting 413 U.S. 1, at 25.

The Court thus went on to reverse the conviction since the film "Carnal Knowledge" was simply not a "public portrayal of *hard core* sexual conduct." 418 U.S. 153, at 161.

The book "Hot and Sultry" is simply not hard core sexual material. When judged by the standards set forth in *Miller* and reaffirmed in *Jenkins* the conclusion is inescapable that the book constitutes protected speech under the First and Fourteenth Amendments of the United States Constitution.

In light of this Court's pronouncement that no one may be constitutionally prosecuted in this area except for the sale of "materials which depict or describe patently offensive 'hard core' sexual conduct," 418 U.S., at 153, the decision below is so clearly erroneous as to justify summary reversal. At the very least, however, plenary review is required before Appellant's conviction may be affirmed.

CONCLUSION

The questions submitted herein are so substantial as to require plenary review. Especially with respect to Question Number I, the substantiallity is demonstrated by the fact that, since Appellant's conviction, numerous other individuals have been prosecuted and convicted for the sale of devices designed for sexual stimulation. If the statute is unconstitutional as Appellant contends, the importance of such a determination will extend to numerous other cases. The Court is thus respectfully requested to note probable jurisdiction and set the case for briefing and oral argument.

Respectfully submitted,

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APPENDIX A

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In the Supreme Court of Georgia.

Decided: February 23, 1977

31875. SEWELL v. THE STATE

NICHOLS, Chief Justice.

Appellant is the operator of an adult book store located in Fulton County. He was arrested after selling a magazine called *Hot and Sultry* and an artificial vagina to a law enforcement officer. At the time of his arrest several other artificial sexual devices on display were seized. He was tried and convicted of violating Code Ann. §26-2101 (c), which provides: "Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section."

1. The first enumeration of error contends the above-quoted statute is unconstitutional for vagueness and overbreadth. Georgia's obscenity statute has previously withstood the same attacks made here. The 1975 amendment to this section, Ga. L. 1975, p. 498, simply defined in more definite terms previously referred to as "material", and made no substantive change so as to require a new determination as to the constitutional issues sought to be raised. *Dyke v. State*, 232 Ga. 817 (I) (209 SE2d 166) (1974) and citations. There is no merit in this enumeration of error.

2. The second enumeration of error contends it was error to overrule the motion to suppress because the evidence was seized without a warrant. The arresting officer

testified that all the "material" confiscated was displayed in a glass case in plain view for everyone who walked in to see. The seizure here comes within the plain view doctrine as held in *State v. Swift,* 232 Ga. 535 (2) (207 SE2d 459) (1974), quoting from *Brisendine v. The State,* 130 Ga. App. 249 (1) (203 SE2d 308) (1973). The trial court did not err in overruling the motion to suppress.

3. The third and fourth enumerations of error contend the evidence did not support the verdict. We have reviewed the transcript and viewed the exhibits transmitted to this court and find no merit in these enumerations of error.

4. The fifth enumeration of error complains of the charge on constructive knowledge as a violation of constitutional requirements of scienter as set forth in *Hamling v. United States,* 418 U.S. 87 (94 SC 2887, 41 LE2d 590) (1975). In *Hamling,* supra at p. 123, the court held: "It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. §1461 nor by the Constitution."

The charge given here was in the exact language of the Code section and did not place a greater burden on appellant than "knowledge of the contents of the materials he distributed." There is no merit in this enumeration of error.

5. The sixth enumeration of error contends the materials are not obscene as a matter of law and are protected expressions under the First and Fourteenth Amendments. It has been held many times by both this

court and the United States Supreme Court that obscene material does not come within the protection of the First Amendment.

Devices such as those involved here do not require a separate adjudication to avoid prior restraint as required in cases of films, books, magazines and other printed material. If they come within the definition in the statute, they are obscene as a matter of law. There is no merit in this enumeration of error.

Judgment affirmed. All the Justices concur, except Gunter, Ingram and Hall, J. J., who concur in the judgment only.

APPENDIX B

Clerk's Office, Supreme Court of Georgia

Dear Sir: ATLANTA March 9, 1977

This motion for a rehearing was denied today:

Case No. 31875, Sewell v. State

Yours very truly,

Mrs. Joline B. Williams,
Clerk

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF GEORGIA

Case No. 31875

WILLIAM M. SEWELL,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that WILLIAM M. SEWELL, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Georgia affirming the judgment of conviction entered herein on February 23, 1977.

This appeal is taken pursuant to the authorization of 28 U.S.C. §1257 (2).

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MICHAEL CLUTTER
Counsel to Appellant

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

2. The pertinent provisions of the Fourth Amendment are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. The pertinent provisions of the Fourteenth Amendment are:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Georgia Criminal Code §26-2101, Acts of 1975, p. 498, provides as follows:

> "(a) A person commits the offense of distributing obscene materials when he sells, lends, rents,

leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation;

(iii) acts of involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

A person convicted of distributing obscene material shall be punished as for a misdemeanor of a high and aggravated nature.

(Acts 1968, pp 1249, 1302; 1971, p. 344; 1975, p. 498.

APPENDIX E

IN THE SUPREME COURT OF GEORGIA

DYKE

v.

THE STATE

29011 Decided: September 24, 1974

INGRAM, Justice.

We review in this case appellant's conviction in the Criminal Court of Fulton County on two counts of exhibiting obscene material in violation of Ga. Code Ann. § 26-2101. Categorically, the appeal deals with three areas of enumerated trial error: (1) the overruling of appellant's motion to dismiss the two-count accusation; (2) the sufficiency of the evidence; and (3) various rulings by the court during the trial, including the correctness of the jury instructions. Each of the alleged errors in these categories will be examined in this opinion.

The case arose as a result of a visit made on October 23, 1973, by a Fulton County investigator to the Festival Cinema Theatre in Atlanta to view a film entitled "Devil in Miss Jones." After purchasing a ticket and seeing the movie, the investigator presented an affidavit to a judge in Fulton County and obtained a warrant to search the threatre premises and seize the film. On the following day, the investigator returned to the theatre with two Atlanta policemen and after they viewed the film, the warrant was served and several employees of the theatre were arrested. Appellant was at a counter in the lobby and the officers first asked him who was the manager of the theatre. Appellant replied that he was the manager and the investigator then identified himself and arrested appellant and two other employees. A commitment hearing was held on November 2, 1973, and as a result of of that hearing appellant was bound

over for trial. Three days later, the same investigator returned to the theatre and again viewed the same film being exhibited there. A second warrant was obtained on another affidavit by the investigator and a commitment hearing was waived on it. Thereafter, a two-count accusation was drawn charging appellant with exhibiting obscene material on these two separate dates and the case went to trial before a judge and jury. At the trial, the state presented oral evidence from the investigator, including testimony that appellant was present on each occasion when the film was shown. The state also exhibited the film to the jury. Appellant presented the testimony of a clinical psychologist regarding the nature of the film and its social value. After receiving instructions from the trial judge, the jury returned a verdict of "guilty" on both counts and appellant received a sentence of 12 months and a $1,000 fine on each count, to be served consecutively.

I

Motion to Dismiss

Appellant argues that Georgia Code Ann. § 26-2101, the obscenity statute under which he was convicted, is too vague and overly broad to withstand the constitutional attacks made on it in this case and that his conviction is a denial of due process of law. It is also argued that the accusation is fatally defective because it did not specify the requisite elements of the offense with which appellant was charged.

Appellant acknowledges the decision of this court in *Slaton, et al. v. Paris Adult Theatre I, et al.*, 231 Ga. 312 (201 SE2d 456) (decided October 30, 1973), but argues that the construction given the obscenity statute in that case is erroneous because the statute fails to give fair warning that criminal liability under it is dependent upon standards announced by the U. S. Supreme Court in *Miller*[1] after the Georgia statute was written.

[1] Miller v. California, 413 U.S. 15, 93 SC 2607 (1973).

All of these well reasoned arguments were made on behalf of appellant in his counsel's brief filed in this court on June 30, 1974. Four days later, the U. S. Supreme Court decided the case of Hamling v. United States, 42 U.S.L.W. 5035 (U. S. June 24, 1974), approving the application of a pre-Miller federal mailing statute to post-Miller defendants. Although the *Miller* obscenity standards were not spelled out in this federal statute, the Court there rejected the same argument urged here by appellant and in doing so, stated: " . . . the language of Roth[2] was repeated in *Miller*, along with a description of the types of material which could constitutionally be proscribed and the adjuration that such statutory proscriptions be made explicit either by their own language or by a judicial construction . . ." Id. at 5043.

We pointed out in *Paris Adult Theatre I, supra*, "that the Georgia statutory definition (of obscenity) has been previously authoritatively construed by this court to include those standards for obscenity as permitted by *Miller*." 231 Ga. 312, 315. We also cited several case examples where this court has defined obscenity, within the meaning of this statute, in substantially the same descriptive language used by the Supreme Court in *Miller*. This list of case examples was not intended to be exhaustive, but merely to illustrate that obscenity under the Georgia statute had been previously construed in a manner consistent with the new *Miller* standards. Therefore, the public generally, including commercial exhibitors of films, had been given fair warning because the descriptive language used in *Miller* contained similar descriptions of obscene materials.

More importantly, all of appellant's constitutional arguments in this case must fail for the reason that on July 25, 1974, the U. S. Supreme Court denied certiorari in *Paris*

[2] Roth v. United States.354 U.S. 476, 77 SC 1304, 1 LE2d 1498 (1957).

Adult Theatre I, et al., v. Slaton, et al. after consideration by the Court of remarkably similar constitutional attacks made on the Georgia obscenity statute for vagueness and overbreadth, and also for alleged denial of due process resulting from this court's previous construction of the obscenity statute in the *Paris Adult* case. This removed the constitutional challenge to the present obscenity statute in Georgia and further discussion of these same issues would be pointless.

We turn next to appellant's contention that the accusation under which he was tried is fatally defective, as it failed to allege the requisite elements of the offense, i.e., the specific standards for judging obscenity set forth in *Miller*, supra. As noted by the Supreme Court in *Hamling*, supra, "the various component parts of the constitutional definition of obscenity need not be alleged in the [accusation] in order to establish its sufficiency . . ." 42 U.S.L.W. 5035, 5044. The language used in the present accusation described the offense in the language of the statute and contained the same construction approved by this court in *Paris Adult Theatre I*, supra. We cannot agree that it is defective as it adequately alleges the offense with which appellant was charged in each count. See, Ca. Code Ann. § 27-701.

II

Sufficiency of the Evidence

Appellant contends that the evidence is insufficient to sustain a finding that the film is obscene and that the evidence fails to prove he had any control over the showing of the film or knowledge of its content.

Appellant argues that this film is not merely a "stag film," but is a full length film with a continuous story line, an attempt at innovative lighting, and that a moral can be

gleaned from viewing it. Therefore, appellant asserts, the film is not "utterly without redeeming social value," one of the tests still required in Georgia to find obscenity. Appellant argues that the film has at least a modicum of social value since it goes beyond a mere "pretense," and appellant relies on United Artists v. Gladwell, 373 FSupp 247 (S.D. Ohio, 1974), and U. S. v. Language of Love, 432 F2d 705 (2nd Cir. 1970), to conclude that under the evidence in this case, including the testimony of the clinical psychologist, this film is not obscene.

We are not bound to prove the jury's finding that this film is obscene, since it is clear the United States Supreme Court has determined that an independent appellate review must be made of the material to decide the constitutional fact of obscenity. Jenkins v. Georgia, 42 U.S.L.W. 5055 (U. S. June 24, 1974); see, also, United States v. Groner, 479 F2d 577 (5th Cir. 1973); and, Jacobellis v. Ohio, 378 U. S. 184, 84 SC 1676, 12 LE2d 793 (1964). We have discharged this constitutional duty by an *en banc* review of this film, "Devil in Miss Jones." Each member of this court concludes from viewing the film that it is rank, hard core, pornography. The conduct of the film actors includes individual and group sexual acts of intercourse, fellatio, and cunnilingus. The film is primarily devoted to acenes depicting bizarre acts of both natural and aberrational sexual conduct that are not necessary to describe in further detail here. During these scenes, the camera focuses primarily upon the actors' genitals which are displayed in a lewd manner. The majority of the scenes depict sexual activity and they appeal to exist solely for their own lewd and lascivious purpose and add no other discernible meaning to the film. The so-called plot which appellant urges is accomplished by the placing of a brief backdrop in the initial scene of the film which shows a woman commiting suicide for which she is to be sent to hell. However, she is permitted to return to earth to lead a life consumed with lust while awaiting the devil's call to go to hell. This woman, who is "Miss Jones," then indulges in every conceivable sexual perversion which she can devise until her time on earth is

ended. The rather brief opening scene is followed by the major portion of the film which is devoted to a variety of sexual experiences. In the final scene, Miss Jones is summoned by the devil and doomed to spend infinity with a deranged male completely uninterested in her voracious sexual appetite.

It is our view that an otherwise obscene film cannot be constitutionally salvaged by adding to it a vague moral which is superimposed on the predominant theme of the film which is an appeal to a prurient interest in sex. This film, in the opinion of the court, is utterly without redeeming social value. It is barren of any effort to express an idea or serve even a questionable social purpose. We find, upon application of the standards set forth in *Paris Adult Theatre I v. Slaton*, supra, that the film, "Devil in Miss Jones," is obscene as a matter of constitutional law and fact.

Appellant further argues the evidence is legally insufficient to sustain his conviction for exhibition of this film because it failed to show he had control over the showing of the film or knowledge of its content. The evidence shows that the film was advertised on the marquee of the theatre managed by appellant and that the theatre was an "adult theatre." Appellant was shown to be on the premises when the film was exhibited on the two separate dates charged in the accusation and, on the second occasion, appellant sold tickets for admission to see it. This was sufficient to authorize the jury to conclude that on each occasion appellant at least aided and abetted in the exhibition of the film. See Ga. Code Ann. § 26-801. Appellant's reliance upon *Sokolic v. State*, 228 Ga. 788 (187 SE2d 822 (1972) is misplaced. The evidence there showed only that the defendant had made an application for a business license to operate a bookstore almost two years prior to the date of the alleged crime and failed to show that defendant had any connection with the store at the time he was charged with selling obscene material through the store.

We must also reject appellant's contention that the evidence failed to prove scienter or guilty knowledge by him of the nature of the film itself. Under Ga. Code Ann. § 26-2101, the applicable test for knowingly exhibiting obscene material is whether the defendant has "knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." The evidence need not show appellant actually knew the film was legally obscene. See, Rosen v. United States, 161 U. S. 29, 16 SC 434, 40 LE2d 606 (1896); United States v. Thevis, 484 F2d 1149 (3) (5th Cir. 1973); and, Hamling v. United States, supra, at 5046. We believe the evidence presented by the state in this case was sufficient to authorize the jury to find beyond a reasonable doubt that appellant was guilty of both counts of this accusation.

Appellant further urges that his constitutional right against self-incrimination was violated when the state was permitted to introduce into evidence appellant's statement that he was the manager of the theatre. Appellant's argument is that this statement was elicited by the state investigator without first giving the warning required by Miranda v. Arizona, 384 U. S. 436 (1966). We find no merit in this argument since, at the time of this question, appellant was not in custody and the criminal investigation had not focused upon him as an individual. *Miranda* was written to "protect the right against self-incrimination of citizens taken into custody or otherwise restrained who are suspected or accused of crime." *Carnes v. State*, 115 Ga. App. 387, 391 (154 SE2d 781) (1969). *Miranda* simply does not apply to the inquiry made of appellant under the facts of this case. Therefore, appellant's statement was properly admitted into evidence by the trial court and could be used by the jury in reaching its verdict.

III

Rulings by the Court

Appellant strongly contends that the trial court erred in not suppressing as evidence the motion picture film seized twice by the state because the affidavits used to obtain the search warrants were legally insufficient. Appellant argues that in each instance the affiant merely recited what he considered to be "highlights" of the film to obtain search warrants without relating the entire text of the film to the judge who issued the warrants. Appellant further argues that affiant's subjective evaluation that the film was "hard core pornography" does not support the affidavit for constitutional purposes. Appellant primarily relies on the rule applied in Lee Art Theatre v. Virginia, 392 U. S. 636 (1968), where it was observed that: "That procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity' (citing from Marcus v. Search Warrant, 367 U. S. 717, 732-32), and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." Id. at 637.

A review of the affidavits used to secure the two warrants issued in this case reveals factual descriptions of numerous representative scenes depicted in the film. These affidavits were sufficient to show probable cause for the issuance of the warrants. See, Heller v. New York, 413 U. S. 483, 93 SC 2789 (1973); and, Crecelius v. Commonwealth, 502 SW2d 89 (1973).

We also note that a commitment hearing was held nine days after service of the first warrant and at that adversary hearing the committal judge determined from the evidence that probable cause existed to conclude there was a violation of the Georgia obscenity statute by appellant. Thereafter, appellant proceeded at his own risk to participate in the exhibition of another copy of the same film by selling admission tickets to the theatre. With regard to the seizure of the second copy of the film, we are aware of the implication of prior restraint. As stated in *Heller*, "On a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding." Id. at 492, 493. In the present case, at the time of seizure of the second copy, there had been a judicial determination (of probable cause) in an adversary proceeding that the film was obscene. In addition, there has been so showing here that seizure of the second copy left the exhibitor without another copy to exhibit, nor is there any evidence that he made any request to copy the film. The Supreme Court, in *Heller*, was seeking to strike a balance between the facilitation of seizing allegedly obscene material as evidence while minimizing the effect of prior restraint of possible First Amendment rights See, Crecelius v. Commonwealth, supra, at p. 92.

We conclude that the search and seizure in this case were not invalid for any reason urged by appellant.

Appellant also argues that he was denied a fair trial by the trial court's interference with the presentation of the defense in the case, and by other conduct which demonstrated prejudice against appellant during the trial of the case. A review of the record does reveal a good deal of conflict between the court and counsel during the trial but it fails to show prejudice against appellant. Most of it occurred in an effort by the court to require counsel in the case, both

for the state and the defendant, to present properly to the jury admissible evidence on the correct legal issues to be decided in the case. It is the duty of the trial court to control the trial of the case and to insure a fair trial to both sides on the disputed issues in the case. Sometimes this requires interference by the court with the conduct of counsel or with a witness in the trial. The trial judge has broad discretion in handling these matters and we are loath to interfere with that discretion unless it is manifestly abused by clearly demonstrated prejudiced or unfairness. While another trial judge may not have conducted the trial of this case in the same way as this trial judge did, we do not agree the trial court interfered so as to deprive the appellant of a fair trial. See, *Carr v. State,* 76 Ga. 592, 593 (2-c) (1885), and *Wilson v. State,* 229 Ga. 224 (2) (SE2d) (1972).

It is also urged in this appeal that the trial court improperly instructed the jury on the law in the case and the conviction must be reversed because of it. Appellant argues that the jury was prevented from intelligently passing upon the issues in the case because the trial court gave instructions on the law to the jury four times during the trial and that each instruction was different. Appellant also contends that parts of the instructions were argumentative and incomplete.

It is well settled by case law that the charge of the court must be taken in its entirely when considering its impact upon the jurors. See, *Cooper v. State,* 212 Ga. 367 (92 SE2d 864); and, *Fox v. Burns,* 142 Ga. 119 (2) (82 SE 521) (1914). The record shows the trial judge was concerned during the trial of the case that the jury know the essential elements of the crime with which appellant was charged in order to understand the evidence being introduced on the issues in the case. In attempting to clarify for the jury the involved legal questions they had to consider, the trial judge did instruct the jury several times during the trial. Although the language in each instruction was not identical, when taken as a whole the jury was clearly informed of the correct

applicable law as it related to the question of obscenity and the responsibility of the jury in the case. The instructions given by the trial judge are supported by the decision of this court in *Slaton v. Paris Adult Theatre I, et al.,* supra, and the trial court was careful to instruct the jury that it was not emphasizing any part of the instructions by repetition. Under the circumstances of this case, we find no reversible error arising from the repetition of instructions given by the trial court.

Appellant also urges that in explaining the community standard portion of the obscenity statute, the trial judge improperly used confusing and argumentative language. Excerpts from the language complained of in the charges are as follows: "...the community of Georgia, as evolved from generation to generation along with our civilization... by general cencensus of the community of Georgia as a whole, would be offensive to the common instincts of decency of people generally ..," Subsequent to the trial of this case, the United States Supreme Court in *Hamling,* supra, approved the use of similar language in the following charge: "The trial court instructed the jury that it was to judge the obscenity *vel non* of the brochure by reference to 'what is reasonably accepted according to the contemporary standards of the community as a whole,... This phrase means, as it has been aptly stated, the average conscience of the time, and the present critical point in the compromise between candor and shame, at which the community may have arrived here and now.'" 42 U.S.L.W. 5035, 5039. We conclude the trial court's instruction in the present case was not error.

Finally, we note the trial court clearly pointed out to the jury that all elements of the definition of obscenity "must coalesce and co-exist." We believe this instruction served to cure any error in the court's use of the disjunctive "or," rather than the conjunctive "and" in the parts of the charge complained of by appellant. Appellant also argues that the failure of the trial judge to define the words, "shameful or

morbid," as requested by appellant at the trial, prevented the jury from intelligently passing upon the appellant's guilt and denied appellant a fair trial. We agree with the appellee that these words used in the statute to define a prurient interest in sex are not words of art but rather are words of common understanding and meaning which require no definition themselves from understanding by the jury.

Therefore, we conclude that the instructions of the trial court, when considered in their entirety, were correct and did not deprive appellant of a fair trial.

Appellant further claims a denial of his double jeopardy rights under the State (Code Ann. § 2-108) and Federal (Fifth Amendment) Constitutions in that he was convicted and sentenced for two crimes when there was but one single transaction in this case. Appellant cites Ga. Code Ann. § 26-506 (multiple prosecutions for same conduct) to contend here there was but one course of conduct and that if a crime has been committed, he can be punished only once for it. Appellant argues that the accusation charged him in two counts of violating the same crime and that the proof involved a regularly scheduled showing of a motion picture in a theatre with no disruption of scheduling. The exhibition of the film on two separate dates, appellant argues, does not permit the state to "pyramid" the charges and punishment against him. Appellant relies primarily upon the cases of *Phillips v. State*, 99 Ga. App. 424 (108 SE2d 721) (1959), and *Estes v. State*, 98 Ga. App. 521 (106 SE2d 405) (1958). Those cases each dealt with lotteries where defendants had sold chances to different people on separate dates for a prize. However, in neither case did the evidence show each transaction involved a different lottery. That is, the evidence did not show that there was more than one drawing and prize so it was held that even though several tickets were sold to different people, they were all for the same lottery and this constituted a single crime.

The facts of the present case are distinguishable from *Phillips* and *Estes*. Ga. Code Ann. § 26-2101 states that, "A person commits the offense of distributing obscene materials when he . . .exhibits or otherwise disseminates to any person any obscene material . . ." Unlike the multi-faceted lottery, a separate offense occurred each time the obscene film was exhibited. Under the rationale of *Phillips* and *Estes*, perhaps it could logically be argued that if appellant sold tickets to see the film on different dates, but had exhibited the movie only once, there would be only a single crime, but that is not the case here. There were two distinct episodes involving different dates of exhibition and even different copies of the same film. This record shows two criminal violations, not a single crime.

This court agrees that First Amendment rights deserve strong protection, e.g., Sanders v. State of Georgia, 231 Ga. 608 (203 SE2d 153) (1974). However, in this case appellant was put on notice, at the commitment hearing, that probable cause existed to believe that this film, "Devil in Miss Jones," was not within the realm of protected expression. In the face of this judicial finding of probable cause for violating Ga. Code Ann. § 26-2101, appellant returned to the theatre and commenced to particpate in the exhibition of a second copy of the same film. This was done at his own risk and appellant will not now be heard to claim double jeopardy as a bar to his conviction for the second offense. See, Crecelius v. Commonwealth, supra.

Judgment affirmed. All the Justices concur.

IN THE

Supreme Court of the United States

NO. 76-1738

WILLIAM M. SEWELL,

Appellant,

VS.

STATE OF GEORGIA,

Appellee.

APPELLEE'S MOTION TO DISMISS AND MOTION TO AFFIRM IN THE ALTERNATIVE WITH SUPPORTING BRIEF

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

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IN THE

Supreme Court of the United States

NO. 76-1738

WILLIAM M. SEWELL,

Appellant,

VS.

STATE OF GEORGIA,

Appellee.

APPELLEE'S MOTION TO DISMISS AND MOTION TO AFFIRM IN THE ALTERNATIVE

Appellee, State of Georgia, moves to dismiss pursuant to Rule 16(1)(b) on the grounds that the appeal does not present a substantial federal question; that the judgment rests on an adequate non-federal basis; and that the Supreme Court of Georgia had and followed the precedents set by this court which adequately covered all questions raised on appeal.

In the alternative, appellee moves to affirm the judgment of the Supreme Court of Georgia, pursuant to Rule 16(1)(c) on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

In the alternative, appellee further moves to affirm pursuant to Rule (1)(d) on the grounds that the sale of the magazine "Hot and Sultry" by the appellant was and is sufficient to support his single-count conviction and the appellant specifically does not challenge that portion of the Georgia statute proscribing and prohibiting the sale of the magazine. See appellant's JURISDICTIONAL STATEMENT, page 4.

ARGUMENT

I.

SECTION 26-2101(c) OF THE CRIMINAL CODE OF GEORGIA DOES NOT TOTALLY PROHIBIT THE DISSEMINATION OF DEVICES DESIGNED OR MARKETED AS USEFUL PRIMARILY FOR THE STIMULATION OF HUMAN GENITALS, NOR IS THE STATUTE UNCONSTITUTIONAL FOR ANY REASON ASSERTED BY THE APPELLANT.

The statute under which appellant was charged, tried, and convicted is Section 26-2101 of the Criminal Code of Georgia, Georgia Laws 1968, pages 1249, 1302, as amended by Georgia Laws 1971, page 344, and further amended by Georgia Laws 1975, page 498.

To fall within paragraph (c) of Section 26-2101 of the Criminal Code of Georgia, any person charged with an offense thereunder must, *knowing the obscene nature of the devices*, sell, lend, rent, lease, give, advertise, publish, exhibit, or otherwise disseminate the device or devices to another person, or possess them with intent to do so. The statute is therefore aimed at a particular segment of society, i.e., those who distribute material of a sexual nature, those who purvey filth for monetary gain. These persons must be assumed to possess specialized knowledge of the use and purpose of the things they sell. The statutory language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices employed by persons who distribute such merchandise. See *Chaplinsky v. New Hampshire*, 315 U.S. 568; *U.S. v. Petrillo*, 332 U.S. 1, 7-8; and *Boyce Motor Lines, Inc. v. U. S.*, 342 U.S. 337, 340. The section in question is not void for vagueness in that men of common understanding must not necessarily guess at its meaning. Persons have fair warning of the prohibited conduct. *Bouie v. City of Columbia*, 378 U.S. 347. Additionally, sections of the code which relate to the same subject matter must be construed together. Section 26-2021 of the Criminal Code of Georgia (Georgia Laws 1975, page 402) makes the instrumental manipulation of another's genital organs for money a crime. When the two sections are read together, 26-2101(c) and 26-2021, the law is made clear that the distribution of instruments commonly and primarily used to masturbate or erotically stimulate the genital organs is prohibited conduct.

Artificial sexual organs or extensions have been held to be devices designed and adapted for indecent or immoral use under 18 U.S.C.A. 1462 and thereby obscene. *U.S. v. Gentile*, 211 F. Supp. 383 (D.C. Maryland 1962). The language in 18 U.S.C.A. 1462 has been held to be constitutional. *U.S. v. Orito*, 413 U.S. 139 (1973); *U.S. v. Reidel*, 402 U.S. 354; *U.S. v. 37 Photographs*, 402 U.S. 376; *Manual Enterprises v. Day*, 370 U.S. 478. A state court has applied the obscenity statute to artificial penises. *People v. Clark*, 304 N.Y.S. 2d 326 (1969).

The statute in question here does not encompass

conduct that is constitutionally protected and does not infringe upon the right of privacy, as it does not fall within the prohibition announced in *Stanley v. Georgia*, 394 U.S. 557. See also *Paris Adult Theatre I v. Slaton*, 413 U.S. 49; and *U.S. v. Orito*, 413 U.S. 139.

Appellant contends that the standards or guide lines set forth in *Miller v. California*, 413 U.S. 15; 93 S. Ct. 2607 (1973), used in determining obscenity in press materials, applies to the devices described and prohibited by Criminal Code Section 26-2101(c). We disagree. The Miller guide lines were set up by this court to be used in protecting the rights guaranteed by the First Amendment to the Constitution of the United States, freedom of speech and freedom of the press. The devices prohibited by Code Section 26-2101 are neither speech nor press materials and are therefore not protected by the First Amendment.

The appellant compares the Georgia obscenity statute with that dealt with by the Supreme Court of the United States in the case of *Griswold v. Connecticut*, 381 U.S. 479 (1965); 85 S.C. 1678. The court there dealt with statutes prohibiting the use of contraceptives.

The Georgia statute does not prohibit the use of the devices described in Code Section 26-2101(c) by married couples or anyone else. As a matter of fact and law, the statute provides exceptions whereby persons can avail themselves of such devices, Code Section 26-2101(e). The procedure required in the exception is the same as that required for dispensing most drugs, including those used for birth control.

The court in *Griswold*, supra, recognized a distinction between "forbidding the use of contraceptives rather

than regulating their manufacture or sale." 381 U.S. 479, 485; 85 S.C. 1678, 1682 (9, 10).

The court in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), again recognized a distinction between the rights of a theater and the rights of privacy of its customers. The court there recognized legitimate state interests in stemming the tide of commercialized obscenity, the interests of the public in the quality of life and the total community environment, the tone of commerce in great city centers, and possibly, the public safety itself. The court there mentioned the arguable correlation between obscene material and crime in holding that state interests are involved.

There are numerous statements and restatements in *Paris Adult Theatre I v. Slaton*, supra, reiterating the rights of the several states to legislate in matters dealt with by the Georgia Legislature in Code Section 26-2101. Some of those excerpts are:

> ". . . From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. . . . The same is true of the federal securities and antitrust laws and a host of federal regulations. . . . Understandably, those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography." 413 U.S. 49, 61; 93 S.C. 2628, 2637 (11).
>
> ". . . The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family

life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a state from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data. . . . It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice—those in politics, religion, and expression of ideas—are explicitly protected. Totally unlimited play for free will, however, is not allowed in our or any other society. . . ." 413 U.S. 49, 63; 93 S.C. 2628, 2638.

". . . Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theater, open to the public for a fee, with the private home of *Stanley v. Georgia*, 394 U.S., at 568, 89 S. Ct., at 1249, and the marital bedroom of *Griswold v. Connecticut*, supra, 381 U.S., at 485-486; 85 S. Ct., at 1682-1683. . . ." 413 U.S. 49, 65; 93 S.C. 2628, 2639 (13, 14).

". . . We have declined to equate the privacy of the home relied on in *Stanley* with a 'zone' of 'privacy' that follows a distributor or a consumer of obscene materials wherever he goes." 413 U.S. 49, 66; 93 S.C. 2628, 2640 (17-21).

The State of Georgia has a legitimate interest in the subject matter of Code Section 26-2101(c) and the same is not unconstitutional for any reason asserted by the appellant.

II.

JURY INSTRUCTIONS ON SCIENTER THAT REQUIRED THE STATE TO PROVE BEYOND A REASONABLE DOUBT THAT THE ACCUSED HAD KNOWLEDGE, EITHER ACTUAL OR CONSTRUCTIVE, AND THAT CONSTRUCTIVE KNOWLEDGE IS KNOWLEDGE OF FACTS WHICH WOULD PUT A REASONABLE AND PRUDENT PERSON ON NOTICE AS TO THE SUSPECT NATURE OF THE MATERIAL, ARE SUFFICIENT TO MEET CONSTITUTIONAL MINIMUM STANDARDS.

Section 26-2101 of the Criminal Code of Georgia provides, in part, as follows:

"(a) a person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word 'knowingly,' as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and *a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material.* . . ." (Emphasis added)

The trial court charged the jury on scienter according to the provisions of the Georgia statute, supra, and this charge is in keeping with a line of cases on the question of scienter in obscenity cases dating back to the year 1896 when the court held that

the person charged with the offense of mailing obscene material must know *or have notice of the contents* of the material.

> "The inquiry, in proceedings under Rev. Stat. §3893, is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail *by one who knew or had notice at the time of its contents*, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails." (Emphasis added) *Rosen v. United States*, 161 U.S. 29 (1896).

Rosen did not require the accused to have knowledge of the obscenity of the material, only *notice of its contents*.

". . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.

We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be. . . ." *Smith v. California*, 361 U.S. 147, 154 (1959).

The Georgia statute, 26-2101 supra, is very similar and compares to New York statutes dealt with by the

court in *Mishkin v. New York*, 383 U.S. 502 (1966) and *Ginsberg v. New York*, 390 U.S. 629 (1968).

The *Mishkin* case pointed out that the New York Court of Appeals had construed Section 1141 of the New York Penal Law to require the "vital element of scienter," and it defined the required mental element in these terms:

> "a reading of the statute (§1141) as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . ."

Section 26-2101 of the Georgia Code requires "knowledge of facts which would put a reasonable and prudent person on notice," while Section 1141 of the New York Penal Law requires the accused to be "in some manner aware."

The statute dealt with in *Ginsberg* defined knowingly as "knowledge" of, or "reason to know" of, the character and content of the material.

Neither *Mishkin* nor *Ginsberg* requires actual knowledge as contended by the appellant herein. Both cases were reviewed and followed in *Hamling v. United States*, 418 U.S. 87 (1974), where the court construed 18 U.S.C. §1461, and held:

> "To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming that he had not brushed up on the law. Such a formulation of the scienter requirement is required neither by the language of 18 U.S.C. §1461 nor by the Constitution."

In the case of *Kuhns v. California*, No. 76-970, this court recently denied petition for certiorari, 21 CrL 4078, to review jury instructions based upon the California obscenity statute which defines "knowingly" as "[be] aware of the character of the matter. . . ." *California v. Kuhns*, 61 Cal. App. 3d 735, 132 Cal. Rptr. 725, 737 (1976).

Appellant concedes that proof of scienter may be made by circumstantial evidence. Appellee contends and respectfully submits that to prove the accused was aware of facts that would put a reasonable and prudent person on notice of the suspect character of the material, is proof of knowledge of the character of the material by circumstantial evidence.

In the case of *Nash v. United States*, 229 U.S. 373 (1913), the court said:

> "In many instances a man's fate depends upon his rightly estimating, that is as the jury subsequently estimates it, some matter of degree, and there is no constitutional difficulty in the way of enforcing the criminal provisions of the Sherman Anti-Trust Act on the ground of uncertainty as to the prohibitions."

Whenever the law draws a line, there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk. *Nash v. United States*, supra; *United States v. Wurzbach*, 280 U.S. 396, 399 (1930). One who goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340.

In summary, on the question of scienter, the Georgia law requires and the jury was instructed that the State must prove, as a bare minimum, that the appellant had knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. No more has ever been required. "Notice of its contents" is required by *Rosen v. United States*, supra; "in some manner aware" was sufficient in *Mishkin v. New York*, supra; "reason to know" was sufficient in *Ginsberg v. New York*, supra; "be aware of the character of the matter" was sufficient in *Kuhns v. California*, supra; eyewitness testimony that the appellant viewed the film is not necessary, *Smith v. California*, supra; and proof of knowledge of the legal status of the material is not required, *Hamling v. United States*, supra.

III.

THE TRIAL COURT DID NOT ERR IN ADMITTING INTO EVIDENCE THE DEVICES SEIZED BY THE OFFICERS AT THE TIME APPELLANT WAS ARRESTED.

Officer Alexander "made a purchase of a book and an artificial vagina" from the appellant, the appellant was then arrested (T-8), and all the items that were *in plain view* and, in the opinion of the officers, designed or marketed as useful primarily for the stimulation of human genital organs were seized by the officers (T-8; T-18; T-19; T-20). No books or magazines were seized. The only book or magazine that was removed from the store was purchased.

The testimony of the officer left no doubt that this was a store operated for the purpose of selling sexually

oriented books, magazines, and devices described in Code Section 26-2101(c). The storefront had "great big, huge signs on it that says 'adult book store,' 'peep show,' and 'mini-movies,' I think, '25¢' or something like that all over the front windows" (T-8). The books were displayed on a book rack where the most stimulating sex scenes could be seen (T-11), all the material had price tags attached (T-14), and the devices, books, and magazines were all displayed in close proximity (T-14-15). Deputy Spence testified that he had gained his knowledge concerning the uses of the devices seized through previous investigations, talking to other persons about the devices, and by viewing advertisements that gave the uses of the devices (T-32).

The appellant contends that the devices seized are protected by the First Amendment to the Constitution and cites *Roaden v. Kentucky*, 413 U.S. 496 (1973) and *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1969) as cases controlling in the seizure of such devices. Needless to say, we disagree. Both the cases cited are cases dealing with the seizure of motion picture films from commercial theaters. We would agree that motion picture films, books, and magazines would not be subject to seizure under the same set of facts and circumstances as those in this case in which the devices were seized.

There is a vast difference in devices designed and/or marketed as useful primarily for the stimulation of human genital organs on the one hand, and motion picture films, books, and magazines on the other; and on the one hand, to seize films, books, and magazines without a prior judicial determination would be a prior restraint of material protected by the First Amendment of the United States Constitution under the pres-

ent decisions of our appellate courts, while on the other hand, the dissemination of material described in Code Section 26-2101(c), prohibited by Code Section 26-2101(a), would not be, and was not in this case, a prior restraint of material protected by the First Amendment.

The Supreme Court of the United States in *Roaden v. Kentucky*, supra, recognized and made a distinction in making a determination as to reasonableness of the seizure, 413 U.S. 496, 501; 93 S.C. 2796, 2800 (1, 2).

The devices seized, not afforded protection under the First Amendment of the Constitution, are declared to be contraband under the provisions of Code Section 26-2104, and therefore subject to seizure under the same rules as other contraband such as illegal drugs, stolen merchandise, and other fruits of crime.

What a person knowingly exposes to the public, even in his own house or office, is not subject to Fourth Amendment protection. *Katz v. U.S.*, 389 U.S. 347, 351 (88 S.C. 507, 511) (1967).

Contraband items in plain view of police officers, in a place where the officers have a right and are authorized to be, are subject to and may be seized without a search warrant. *Coolidge v. New Hampshire*, 403 U.S. 443 (91 S.C. 2022) (1971); *Harris v. United States*, 390 U.S. 234, 236 (88 S.C. 992, 993) (1968).

The devices seized were in plain view of the officers while the officers were in a lawful position to view the items seized, and for that and the foregoing reasons asserted, no warrant was necessary to make a lawful seizure.

IV.

THE MATERIALS CHARGED AGAINST APPELLANT ARE OBSCENE AND ENTITLED TO NO PROTECTION UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

In a review of the magazine in question, "Hot and Sultry," the court will find not only nudity and lewd exhibition of the genitals by both males and females, but there are also explicit depictions of simulated heterosexual intercourse (back cover), simulated heterosexual cunnilingus (page 34), and simulated homosexual cunnilingus (page 26). Appellant contends that these depictions do not constitute hard core pornography, and in support of these contentions, appellant cites numerous cases in which convictions were reversed by this court. With the exception of *Jenkins v. Georgia*, 418 U.S. 153 (1974), all the cases cited by the appellant were decided during the period between *Roth v. United States*, 354 U.S. 476 (1957) and *Miller v. California*, 413 U.S. 15 (1973); a period when no majority of the court could agree on a standard to determine what constitutes obscene, pornographic material subject to regulations under the States' police power, and at which time convictions were reversed by the court summarily.

> "Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, e.g., *Redrup v. New York*, 386 U.S. at 770-771, 87 S. Ct. at 1415-1416. We have seen 'a variety of views among the members of the Court

> unmatched in any other course of constitutional adjudication.' *Interstate Circuit, Inc. v. Dallas*, 390 U.S., at 704-705, 88 S. Ct. at 1314 (Harlan, J., concurring and dissenting)." . . . *Miller v. California*, 413 U.S. 15, 22, 88 S. Ct. 2607, 2614.
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> "In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup v. New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* 'policy.' See *Walker v. Ohio*, 398 U.S. 434-435, 90 S. Ct. 1884, 26 L. Ed. 2d 385 (1970) (dissenting opinions of Burger, C. J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." *Miller v. California*, 413 U.S. 15, 88 S. Ct. 2607, 2614 (Footnote 3).

In *Jenkins v. Georgia*, supra, the film "Carnal Knowledge" was in question and the scenes in which sexual conduct including "ultimate sexual acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. Such is not the case in the magazine in question, for there the camera does focus on the bodies of the participants.

Appellee contends that the magazine is hard core pornography and obscene material when judged by the guide lines established in *Miller v. California*, supra, and the Georgia obscenity statute, Code Section 26-2101, which is patterned after the *Miller* case.

CONCLUSION

For all the foregoing reasons, the appeal should be dismissed; or in the alternative, the judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I have this day caused to be mailed three copies of the within motion, first class postage prepaid, to Robert Eugene Smith, Esq., 1409 Peachtree Street, N.E., Atlanta, Georgia 30309.

This 13th day of July, 1977.

Leonard W. Rhodes

LEONARD W. RHODES
Counsel for Appellee